

JOSE GAXIOLA,	)	
	)	
Petitioner,	)	3:16-cv-00500-RCJ-VPC
	)	
vs.	)	<b>ORDER</b>
	)	
WARDEN, LCC, <i>et. al</i> ,	)	
	)	
Respondents.	)	
	/	

The court notes that petitioner has a previous case under 28 U.S.C. § 2254 with respect to the conviction challenged in this newly-submitted petition: *Gaxiola v. Palmer, et. al*, 3:06-cv-00516-RCJ-RAM. In that proceeding, the court denied the petition on merits. ECF No. 33, 3:06-cv-00516-RCJ-RAM.

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

1 (B)(I) the factual predicate for the claim could not have been discovered  
2 previously through the exercise of due diligence; and

3 (ii) the facts underlying the claim, if proven and viewed in light of the  
4 evidence as a whole, would be sufficient to establish by clear and convincing  
evidence that, but for constitutional error, no reasonable factfinder would have found  
the applicant guilty of the underlying offense.

5 In addition, 28 U.S.C. § 2244(b)(3) requires a petitioner to obtain leave from the appropriate court of  
6 appeals before filing a second or successive petition in the district court.

7 The claims in the current petition are claims that either were or could have been raised in the  
8 earlier petition. Petitioner has not made a sufficient showing that the exceptions outlined in 28  
9 U.S.C. § 2244(b)(2) apply. More importantly, he has failed to secure an order from the court of  
10 appeals authorizing this action as required by 28 U.S.C. § 2244(b)(3). Therefore, this court is  
11 without jurisdiction to consider the habeas petition filed herein.


12 *Certificate of Appealability*

13 If petitioner seeks to appeal this decision, he must first obtain a certificate of appealability.  
14 See 28 U.S.C. § 2253(c) (providing that an appeal may not be taken to the court of appeals from a  
15 final order in a habeas corpus proceeding unless a circuit justice or judge issues a certificate of  
16 appealability); *Sveum v. Smith*, 403 F.3d 447, 448 (7<sup>th</sup> Cir. 2005) (per curiam) (holding that a  
17 certificate of appealability is required when the district court dismisses a motion on the ground that it  
18 is an unauthorized, successive collateral attack). A certificate of appealability may issue only if the  
19 petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §  
20 2253(c)(2). In addition, when a § 2254 petition is denied on procedural grounds, a certificate of  
21 appealability should issue only when the petitioner shows that reasonable jurists "would find it  
22 debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529  
23 U.S. 473, 484 (2000).

24 Petitioner has not made the necessary showing. Therefore, the court denies a certificate of  
25 appealability.

DATED: This 18<sup>th</sup> day of October, 2016.

2016.



UNITED STATES DISTRICT JUDGE